IN THE UNITED STATES DISTRICT COURT FOR THE WESTERN DISTRICT OF VIRGINIA, LYNCHBURG DIVISION

Civil No. 198

O. C. WILEY & SONS, INCORPORATED, APPELLANT,

v.

UNITED STATES OF AMERICA, AND INTERSTATE COMMERCE COMMISSION, DEFENDANTS-APPELLEES

MOTION TO AFFIRM

Appellees, pursuant to Rule 12, paragraph 3, of the Revised Rules of the Supreme Court of the United States, move that the judgment and decree of the District Court be affirmed.

This is a direct appeal from a final judgment and decree, entered on September 3, 1949,[1] by a specially constituted district court of three judges pursuant to Sections 1253, 2284 and 2325, Title 28 of the United States Code, dismissing appellant's

[1] The Court also rendered its opinion on September 3, 1949; one judge dissented without opinion.

complaint seeking to set aside an order of the Interstate Commerce Commission. Appeal was allowed on November 1, 1949, and appeal papers were served on November 2, 1949.

The Commission's order, dated June 18, 1948, authorized and approved the purchase by John C. Fleming, Jr. (hereinafter called Fleming) of the motor carrier operating rights of Stuart Lumber Corporation (hereinafter called Stuart) [2] pursuant to an application filed by the parties under Section 5(2) of the Interstate Commerce Act (49 U.S.C. Sec. 5(2)).[3]

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[2] The order in terms authorized and approved the purchase by Fleming of the operating rights of Stuart, which consisted of a certificate authorizing operations in interstate commerce as an irregular route motor carrier of general commodities, with certain exceptions, between points in Lunenburg, Mecklenburg, Halifax, Charlotte, Prince Edward and Nottoway Counties, Virginia, on the one hand, and on the other, Washington, D. C., Baltimore, Md. and points in North Carolina within 160 miles of Victoria, Va.; of sugar and canned goods from Baltimore, Md. to Danville and Martinsville, Va.; and of malt beverages from Newark, N.J. to Red Oak, Va., with return of empty malt beverage containers to points of origin.

[3] Section 5(2) reads (in part) as follows:

"(2)(a) It shall be lawful, with the approval and authorization of the Commission, as provided in subsection (b)—

(i) * * * for any carrier, or two or more carriers jointly, *to purchase*, lease, or contract to operate the properties, or any part thereof, of another;—

(b) Whenever a transaction is proposed under subparagraph (a), *the carrier or carriers or person seeking authority therefor shall present an application to the Commission*, and thereupon the Commission * * * shall afford reasonable opportunity for interested parties to be heard. If the Commission shall consider it necessary in order to determine whether the finding specified below may properly be made, it shall set said application for public hearing, and a public hearing shall be held in all cases where carriers by railroad are involved. *If the Commission finds that, subject to such terms*

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Prior to the entry of the aforesaid order appellant protested its issuance on the ground that by a contract with Stuart, which antedated Stuart's contract to sell to Fleming, appellant had "purchased" the identical operating rights which Stuart sold to Fleming. Although appellant had filed no application with the Commission seeking authority to purchase the rights involved, it requested the Commission to hold a public hearing on the Stuart-Fleming application so as to afford it an opportunity to be heard on the question whether Stuart had sold these rights to appellant. By its report and order of June 18, 1948, the Commission found that authority granted under Section 5 of the Act is permissive only; that it is not a court vested with authority to interpret and enforce the terms of contracts involving the sale of operating rights; and that a public hearing was not necessary to dispose of the Stuart-Fleming application.[4]

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and conditions and such modifications as it shall find to be just and reasonable, the proposed transaction is within the scope of subparagraph (a) and will be consistent with the public interest, it shall enter an order approving and authorizing such transaction, upon the terms and conditions, and with the modifications, so found to be just and reasonable." (Italics supplied.)

Section 5(4) provides:

"It shall be unlawful for any person, except as provided in paragraph (2), to enter into any transaction within the scope of subparagraph (a) • • •."

Section 5(11) provides:

"The authority conferred by this section shall be exclusive and plenary • • •."

[4] "Wiley represents that on December 11, 1947, the vendor made a prior offer to sell to it the rights involved herein, and that it has instituted litigation for specific performance of

With respect to appellant's insistence that, since it had purchased the Stuart rights, the Commission should not and could not have approved the transfer of these rights to Fleming, appellees submit that the alleged contract was an executory contract only and there was never even an attempted executed transfer by Stuart of the operating rights to appellant. Moreover, there could have been no effective transfer of those rights to appellant without the permission of the Commission. Interstate Commerce Act, Sec. 5(2), (4).

While the Stuart-Fleming application was pending before the Commission and before its order had been entered approving the purchase by Fleming of the Stuart operating rights, appellant filed an equity suit against Stuart in a court of the State

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that offer. It requests that under these circumstances the instant application be assigned for hearing to determine whether vendor's operating rights were sold to Wiley. Wiley has filed no application with this Commission seeking authority to purchase the considered rights. We have repeatedly stated that authority granted under former section 213 and present section 5 is permissive only, and may or may not be exercised by the parties, and that all matters involving the interpretation of contracts and the enforcement of the terms thereof must be left for settlement between the parties themselves or by the courts. See *Raymond Bros. Motor Transp., Inc.—Purchase-Berzel*, 15 M.C.C. 477, *Yellow Cab Transit Co. (Oklahoma)—Merger*, 25 M.C.C. 543, *Harris Bros. Transfer Co.—Purchase—Glosson-Hancock*, 25 M.C.C. 645, *Marcell—Purchase—Flemings*, 39 M.C.C. 5, *Lancaster Transp. Co.—Purchase—York-Buffalo M. Exp.*, 39 M.C.C. 579, and *Marion Trucking Co., Inc.—Purchase—Harwood Trucking*, 45 M.C.C. 377. We are convinced that the record supports the conclusion that approval of the transaction would be consistent with the public interest, and that under the circumstances a public hearing is unnecessary to dispose of the issues presented" [p. 3].

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of Virginia, seeking specific performance of its alleged contract. Appellant then requested the Commission to withhold action on that application pending determination of its suit for specific performance. Although the Commission proceeded to enter its order authorizing and approving the transfer of the operating rights to Fleming before final determination was made by the State Court of appellant's suit for specific performance, it did delay final and definitive action by withholding the issuance of a certificate of public convenience and necessity to Fleming until appellant could establish in the State Court its rights, if any, to the Stuart operating authority.

The State Court dismissed appellant's suit, holding that it could not decree specific performance. Appellant was permitted to and did transfer the cause to the law side of the court, where it proceeded as an action for damages arising from a breach of contract. The case was heard before a jury, and a money judgment in the amount of $300 was awarded in favor of appellant against Stuart, which became final prior to the hearing before the three-judge court or the release by the Commission of the certificate of public convenience and necessity to Fleming.

Appellees submit that, as the district court held, the decision of the Virginia Court is *res adjudicata* in its determination, from which no appeal was taken, that appellant was not entitled to specific

performance by Stuart of the Stuart-Wiley contract, and that all of appellant's rights under this contract became merged in the final money judgment.

Appellant made no allegations either before the Commission or in the district court that the action of the Commission in approving the transfer was not in the public interest, that it was not within the scope of Section 5(a) of the Act, or that the terms and conditions of the purchases were unjust or unreasonable as between the parties. Yet such allegations furnish the only basis upon which appellant could predicate a claim to relief before the Commission or the Court. The primary concern of the Commission in this and similar proceedings is the protection of the public interest, and the courts have held that a strong showing must be made before an order of the Commission will be set aside.[5]

Congress has delegated to the Commission broad and exclusive administrative discretion in passing upon consolidations, mergers, leases, purchases and contracts to operate common carriers subject to the Act.[6] The Commission's authority over such matters was made "exclusive and plenary" and in-

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[5] *McLean Trucking Co.* v. *United States*, 321 U. S. 67, 87-89; *Texas* v. *United States*, 292 U. S. 522; *Interstate Commerce Commission* v. *Union Pacific R. R.*, 222 U. S. 541, 547-549; *Alton Railroad Co.* v. *United States*, 315 U. S. 15, 23; *Virginia Stage Lines* v. *United States*, 48 F. Supp. 981, affirmed 329 U. S. 668.

[6] *Virginia Stage Lines* v. *United States*, *supra*.

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dependent of all other state and federal authority (Section 5(11)). The purpose was to authorize voluntary arrangements for the acquisition of control of carriers, provided that the Commission should find such arrangements to be consistent with the public interest. The Commission made such a finding [7] in approving the transfer of the Stuart operating rights to Fleming. Nothing more was necessary to satisfy the requirements of the Statute.

Appellees submit that this appeal involves no substantial questions. Appellant's arguments as revealed by its Jurisdictional Statement are simply reiterations of arguments previously rejected by the Commission and the three-judge district court, addressed to matters lying within the discretion of the Commission. Appellant's position is predicated entirely upon the assumption that it purchased the Stuart operating rights prior to

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[7] "We find that the purchase by John C. Fleming, Jr., doing business as Fleming's Transfer, of the operating rights of Stuart Lumber Corporation, upon the terms and conditions above set forth, which terms and conditions are found to be just and reasonable, is a transaction within the scope of Section 5(2) (a), and will be consistent with the public interest, and that, if the transaction is consummated, John C. Fleming, Jr., doing business as Fleming's Transfer, will be entitled to a certificate covering the operating rights confirmed in No. MC-310; which rights are herein authorized to be unified with rights otherwise confirmed in him, with duplications eliminated; *provided, however,* that, if the authority herein granted is exercised, John C. Fleming, Jr., doing business as Fleming's Transfer, shall immediately write off the amount assigned to his "Other Intangible Property" account as a result of the instant transaction, such write-off to be accomplished in the manner to be determined upon submission of the journal entries proposed to record and purchase as required by our order herein" [pp. 3-4].

the transfer of those rights by Stuart to Fleming and that the Commission could not authorize and approve the transfer of its operating rights to Fleming without appellant's consent. That this assumption is wholly untenable has been clearly shown. Whatever rights appellant had were satisfied by the recovery of a money judgment in the State Court which was allowed to become final. The State Court judgment was not a confirmation of the sale of the operating rights to appellant, but rather an award of damages for failure to sell after an agreement to do so.

For the foregoing reasons, it is evident that this appeal presents no substantial question. It is, therefore, respectfully submitted that the judgment of the District Court should be affirmed.

PHILIP B. PERLMAN,
Solicitor General.
DANIEL W. KNOWLTON,
Chief Counsel,
Interstate Commerce Commission.

NOVEMBER 1949.

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